Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1707

In re ESTATE OF HENRY W. BIDDLE, Deceased

CHARLES A. DaCOSTA, Jr. and
PETER M. DaCOSTA,
Petitioners

JAMES MURDOCK DaCOSTA (adoptee), and
THE FIDELITY BANK, Surviving trustee,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Roland J. Christy
Attorney for Petitioners

1501 Cedar Hill Rd.
Spring House, PA 19477
(215) 646-0186

LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

TABLE OF CONTENTS

	Page
Opinions Below	2
Statement of Jurisdiction	3
Questions Presented for Review	3
Constitutional Provision Involved	3
Statement of the Case	4
Argument	6
Conclusion	8

Appendix:

Estate of *Henry W. Biddle,* Deceased, 410 A.2d 782	A-1
Biddle Trust, 27 FID. REP. 206	A-12
Will of *Henry W. Biddle*	A-20
Biddle Estate, 102 Montg. L.R. 184; 27 FID. REP. 97	A-25

CITATIONS

Page

CASES:

Bell Estate, 439, Pa. 433, 267 A.2d 862 7

Bell Estate, 463 Pa. 109, 343 A.2d 679 6

Biddle, Estate of Henry W., Deceased, 410 A.2d 782 ..... 2, A-1

Biddle Trust, 27 Fiduciary Reporter 206 (Chester County) 2, 4, 6, A-12

Biddle Trust, 27 Fid. Rep. 97, 102 Montg. Co. L.R. 184 ..... 2, A-25

Billings v. Fowler, 279 N.E. 2d 906, 361 Mass. 230 5, 8

Borsch Estate, 362 Pa. 581, 67 A.2d 119 5

Boston Safe Deposit and Trust Co. v. Dean, 279 N.E. 2d 902, 361 Mass. 244 8

Boston Safe Deposit and Trust Co. v. Fleming, 279 N.E. 2d 342, 361 Mass. 172 8

Ervine's Appeal, 16 Pa. 256, 55 A.D. 499 8

Fownes Trust, 421 Pa. 476, 220 A.2d 8 7

Griswold Estate, 354 A.2d 717, 140 N.J. Super. 35 5, 8

Puterbaugh's Estate, 261 Pa. 235, 104 A. 601 ... 7

Tafel Estate, 449 Pa. 442, 296 A.2d 797 ....4, 5, 6, 7

Tower Estate, 463 Pa. 93, 343 A.2d 671 6

CONSTITUTION AND STATUTES:

14th Amendment to the Constitution of the United States 3, 7

27 U.S.C., Section 1257(3) 3

Pennsylvania WILLS ACT of 1917, Act of June 7, 1917, P.L. 403, Sec. 16(b), 20 P.S. Chap. 2, App. Sec. 228. 7

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, CHARLES A. DaCOSTA, JR. and PETER M. DaCOSTA, by their attorney, ROLAND J. CHRISTY, ESQUIRE, respectfully pray that a Writ of Certiorari issue to review the order and opinion of the Supreme Court of Pennsylvania entered in this proceeding on February 1, 1980.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 410 A.2d 782, and appears in Appendix A-1. The opinion of the lower court is reported in 27 Fiduciary Reporter 206, and appears in Appendix A-12. A related case, *Biddle Trust*, 102 Montg. Co. L. R. 184, 27 Fiduciary Reporter 97, appears in Appendix A-25.

STATEMENT OF JURISDICTION

1. The order and opinion of the Supreme Court of Pennsylvania was filed on February 1, 1980, and this Petition for Certiorari was filed within ninety (90) days of that date.

2. The jurisdiction of this Honorable Court is invoked under 27 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a change in the decisional law may be applied retroactively to construe the will of a decedent?

2. Whether a change in the decisional law may be applied retroactively to diminish vested interests in violation of the due process clause of §1 of the 14th Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Section 1, Amendment 14:

> ". . . nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Prior to 1972 the law in Pennsylvania was that a gift or bequest to a person or persons other than the testator's "child" or "children" excluded adopted children.

On November 17, 1972 the Supreme Court of Pennsylvania changed the law: *Tafel Estate,* 449 Pa. 442, 296 A.2d 797 which held that "unless a contrary intention appears," it will be presumed that the testator intended to include any "child" or "children" who were adopted.

Henry W. Biddle made his Last Will and Testament on December 16, 1920. He died on July 2, 1923, leaving to survive him, among others, a grandchild, C. Alexander DaCosta, who at the time of his death on February 9, 1950, was receiving one-third of the income from a residuary trust under decedent's will.

C. Alexander DaCosta was survived by two natural children, the petitioners, Charles A. DaCosta, Jr. and Peter M. DaCosta; and by an adopted son, James Murdock DaCosta. He was adopted in 1942. He was born December 19, 1928.

From 1950 until 1976 the one-third share of income from the residuary trust formerly distributed to C. Alexander DaCosta, was distributed to petitioners.

In 1976 James Murdock DaCosta, citing *Tafel Estate,* supra, claimed an equal share with petitioners in said one-third. The Fidelity Bank, surviving trustee, thereupon filed its fourth account and Statement of Proposed Distribution in the Orphans' Court of Chester County, Pennsylvania. The trustee proposed to reduce the income shares of each petitioner from 1/6 to 1/9 of the trust income. Petitioners filed objections/exceptions to this proposed diminution of their trust income shares. Following argument on the objections/exceptions the lower court deemed "it unnecessary to consider many of the arguments *contra* to the (adoptee's) position, and (held) that the doctrine of res judicata . . . precludes any participation by (adoptee). *Biddle Trust,* 27 Fiduciary Reporter, 206, 211 (Appendix A-12).

On appeal by the adoptee to the Supreme Court of Pennsylvania, petitioners in their brief and oral argument pointed out that a diminution of the income shares of the petitioners would violate the Fourteenth Amendment:

> ". . . if the mandates of the Fourteenth Amendment are relevant, then the (petitioners) are more appropriately deserving of Constitutional protection. To reduce the right of natural children is clearly an unconstitutional deprivation of property without due process. [(See *Billings v. Fowler,* 297, N.E. 2d 906 (Mass. 1972); *Griswold Estate,* 354 A.2d 717 (N.J. 1976); and *Borsch Estate,* 362 Pa. 581, 67 A.2d 119 (1919))]." Appellees' Brief, p. 39.

The Supreme Court of Pennsylvania reversed the lower court by applying retroactively the new decisional rule created in 1972 in *Tafel Estate*, supra.

ARGUMENT
AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Henry W. Biddle made his Last Will and Testament on December 16, 1920. He died on July 2, 1923.

Item SIXTH of the will provides, inter alia, for distribution of trust income to testator's grandchildren, and should any grandchild be deceased, his share of income shall be distributed to his "children and issue." C. Alexander DaCosta, a grandchild, died on February 9, 1950, leaving to survive him two natural children: Charles A. DaCosta, Jr. and Peter M. DaCosta; and an adopted child: James Murdock DaCosta who was adopted in 1942.

From February 9, 1950 until 1976 the petitioners received from the residuary trust the share of income which their father had been receiving. In 1976 James Murdock DaCosta claimed a share of that income by reason of the decision in *Tafel Estate*, 449 Pa. 442, 296 A.2d 797 (1972), whereupon The Fidelity Bank, surviving trustee, filed its fourth account. At the audit of the account the petitioners opposed the adoptee's claim and filed objections to the trustee's statement of proposed distribution on the grounds that by a prior adjudication each had been awarded a one-sixth share of the trust income, that their shares had become vested and could not be taken from them under *Tafel Estate*.

The court dismissed the adoptee's claim. *Biddle Trust*, 27 Fiduciary Reporter 206, 215 (1977) (Appendix A-12). "The auditing judge deems it unnecessary to consider many of the arguments *contra* to contestant's position, and holds that the doctrine of res judicata as enunciated and applied in *Tower Est.*, 463 Pa. 93, 343 A.2d 671, and *Bell Est.*, 463 Pa. 109, 343 A.2d 679 precludes any participation by contestant in view of the final and unappealed decision of this court on January 21, 1952 on the trustee's second accounting." Id. at 211 (Appendix A-16).

In the Orphans' Court and in the Supreme Court of Pennsylvania the petitioners argued that (1) the settled law in Pennsylvania when testator made his will and when he died was that *children* and *issue* did not include adopted children and adopted issue. Wills Act of 1917, Act of June 7, 1917, P.L. 403, sec. 16(b), 20 P.S. Chap. 2, App. sec. 228; *Puterbaugh's Estate,* 261 Pa. 235, 104 A. 601 (1918), and (2) that each petitioner had a 1/6 vested interest in the trust income which was constitutionally protected under the due process clause against diminution under *Tafel Estate,* supra. The lower Court deemed it unnecessary to pass on these points. *Biddle Trust,* 27 Fiduciary Reporter 206, 211 (1977) (Appendix A-16). The Supreme Court of Pennsylvania in a 4 to 2 decision has denied the petitioners' constitutionally protected vested interest in the trust income. The Court held that under *Tafel Estate,* supra, which was a change made in 1972 in the decisional law, the adoptee was entitled to a share in the petitioners' trust income. *In re Estate of Henry W. Biddle, Deceased,* 410 A.2d 782, 787, — Pa. — (1980) (Appendix A-1).

Section 1 of Amendment XIV to the United States Constitution provides that ". . . nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The decision of the Supreme Court of Pennsylvania has deprived petitioners of their vested interest in the income of the Biddle Trust without due process of law. Until *Tafel Estate,* supra, the well-established rule in Pennsylvania was that persons adopted after a testator's death were excluded from participation in gifts to classes described by relationship to someone other than the testator unless the will evinced an actual intent to include them. *Fownes Trust,* 421 Pa. 476, 220 A.2d 8 (1966); *Bell Estate,* 439 Pa. 433, 267 A.2d 862 (1970).

The extension of adopted-children's rights by a post-death statute would be an unconstitutional depriva-

tion of property without due process of law: *Billings v. Fowler,* 279 N.E. 2d 906, 361 Mass. 230 (1972); *Boston Safe Deposit and Trust Co. v. Dean,* 279 N.E. 2d 902, 361 Mass. 244 (1972); *Boston Safe Deposit and Trust Co. v. Fleming,* 279 N.E. 2d 342, 361 Mass. 172 (1972); *Griswold Estate,* 354 A.2d 717, 140 N.J. Super. 35 (1976).

To reduce each petitioner's vested share of trust income from 1/6 to 1/9 whether by a post-death statute or a post-death change in the decisional law violates the due process clause of the 14th Amendment to the United States Constitution.

"A just government ought as emphatically to protect wills as deeds and contracts. Because, by so doing, not only the rights of the living are secured, but also the rights of the dead — rights which all civilized nations regard. . . ." *Ervine's Appeal,* 16 Pa. 256, 265, 55 A.D. 499 (1851).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision and opinion of the Supreme Court of Pennsylvania.

Respectfully submitted,

ROLAND J. CHRISTY
1501 Cedar Hill Rd. POB 285
Spring House, PA 19477
(215) 646-0186

April 28, 1980

In re ESTATE of Henry W. BIDDLE, Deceased.

Appeal of James Murdock DaCOSTA.

Supreme Court of Pennsylvania.

Argued Oct. 15, 1979.
Decided Feb. 1, 1980.

Testator's deceased grandchild's adopted son claimed right to participate in future income distributions from testamentary trust. The Court of Common Pleas, Chester County, Orphans' Court Division, No. 15,964 of 1924, entered March 9, 1977, William J. C. O'Donnell, J., ruled that the claim was barred by principles of res judicata, and adopted son appealed. The Supreme Court, No. 398 January Term, 1977, Roberts, J., held that: (1) fact that adopted son could but did not claim right to receive income from the trust in proceeding, in which accounting proposing that testator's grandchild's one-third share of income be distributed between his two natural children and that his adopted son be excluded was confirmed, did not, under principles of res judicata, preclude adopted son from claiming right to share in future distributions of trust income; (2) will did not demonstrate that testator had intention to exclude adopted children, and, thus, presumption that adopted children were included in a testamentary gift to "children" applied; and (3) state Supreme Court's decision, which required application of such a presumption, was not inapplicable to testator's 1923 will on ground that such decision was based on construction of Adoption Act of 1925.

Decree reversed, and case remanded.
Larsen and Flaherty, JJ., concurred in result.
Eagen, C. J., and O'Brien, J., dissented.

1. Judgment 739

Fact that testator's grandchild's adopted child could but did not claim right to receive income from testamentary trust in proceeding, in which an accounting proposing that grandchild's one-third share of income be distributed between his two natural children and that his adopted child be excluded was confirmed, did not, under principles of res judicata, preclude adopted child from claiming more than 20 years later that he had right to share in future distributions of trust income, in that the claim did not involve trust income already distributed and that claim was based on recently announced rule that adopted children were presumptively included in testamentary gift to "children." (Per Roberts, J., with one Justice concurring and two Justices concurring in result.)

[Pa. 783] **2. Courts 99(1)**

Rule of law made in distribution of a portion of an estate is not binding on a court in subsequent adjudication relating to another portion. (Per Roberts, J., with one Justice concurring and two Justices concurring in result.)

3. Courts 99(1)

Auditing judge has duty to require that the then present allocation be controlled by law in effect at time of the audit. (Per Roberts, J., with one Justice concurring and two Justices concurring in result.)

4. Courts 100(1)

Fairness requires that rule that adopted children are to be presumptively regarded as included in testamentary gift to "children" unless testator's intention to exclude adopted children is clearly indicated is to be applied prospectively. (Per Roberts, J., with one Justice concurring and two Justices concurring in result.)

5. Wills 497(5), 498

Will, which established testamentary trust and merely used the words "children" and "issue," did not demonstrate that testator had intention to exclude adopted children, and, thus, presumption that adopted children were included in a testamentary gift to "children" applied so as to permit testator's deceased grandchild's adopted child to share in distributions of trust income. (Per Roberts, J., with one Justice concurring and two Justices concurring in result.)

6. Wills 497(5)

State Supreme Court decision, which required that adopted children be presumptively included in a testamentary gift to "children" unless testator's intention to exclude adopted children was clearly indicated, was not inapplicable to 1923 will on ground that such decision was based on construction of Adoption Act of 1925, in light of fact that it was based on Wills Act of 1917. (Per Roberts, J., with one Justice concurring and two Justices concurring in result.) 1 P.S. §4 (Repealed); 20 P.S. §228 (Repealed).

7. Property 1

Rights to a distinct piece of property are not determined by judgment concerning another piece of unrelated property. (Per Roberts, J., with one Justice concurring and two Justices concurring in result.)

Before EAGEN, C. J. and O'BRIEN, ROBERTS, NIX, MANDERINO, LARSEN and FLAHERTY, JJ.

OPINION

ROBERTS, Justice.

Since *Tafel Estate*, 449 Pa. 442, 296 A.2d 797 (1972), we have required that adopted children be presumptively included in a testamentary gift to "children" unless the testator's intention to exclude adopted chil-

dren is clearly indicated. Appellant, an adopted child, claims the right to participate in future income distributions from a testamentary trust established by his adoptive great-grandfather. The orphans' court held that because appellant could have litigated his claim at a 1952 audit of an account of the estate but failed to do so, that appellant's claim to future income is now barred by principles of res judicata. We hold that the 1952 accounting does not preclude appellant from sharing in future distributions of trust income and accordingly reverse.

In 1923 Henry Biddle died a resident of Chester County. By item SIXTH of his will he left his residuary estate in trust, directing payment of half the income to his daughter Mildred L. Cadwalader for her life, and the other half, per stirpes, to the issue of his deceased daughter, Juliet DaCosta. The testator instructed that on
[784 Pa.] the death of his daughter Mildred the income be paid to his grandchildren, per capita, and to the issue of any deceased grandchildren, per stirpes.[1] The will was duly

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1. The relevant portion of item SIXTH of testator's will provides as follows:

> "Upon the death of my said daughter, Mildred L. Cadwalader, to pay and divide the entire income from my said residuary estate during the continuance of this trust among all of my grandchildren, share and share alike, such grandchildren to take per capita and not per stirpes. If, however, during the continuance of the said trust of any such grandchildren shall die, leaving children or issue of deceased children him or her surviving, such children and issue of deceased children to take among them, per stirpes, the share of income which their parent would have taken if living. If, however, any of such grandchildren shall die during the continuance of the said trust without leaving children or issue of deceased children him or her surviving, then the share of the said grandchild so dying shall be held upon the same terms of trust and with the same remainders over as is herein provided for the share of my other grandchildren."

Trust payments are to end and the trust principal is to be distributed at the death of the last grandchild who was living at the time of Henry Biddle's death. One such grandchild is now living.

probated on July 9, 1923 and administration of the trust began.

On September 19, 1949 testator's daughter Mildred died. Shortly thereafter, on February 9, 1950, C. Alexander DaCosta, one of testator's three grandchildren also died. He was survived by two natural children, Charles A. DaCosta, Jr., and Peter M. DaCosta, and by appellant, James Murdock DaCosta, whom C. Alexander DaCosta had adopted on April 25, 1942 when appellant was thirteen years old.

After these deaths the trustees presented an accounting of testator's estate to the Orphans' Court of Chester County. The proposed distribution divided C. Alexander DaCosta's one-third income share between his two natural children and excluded appellant. Appellant was notified of the accounting and of the proposed distribution plan but asserted no claim. The accounting was confirmed by decree nisi and then confirmed absolutely by pro forma decree on January 21, 1952. The payment of trust income has continued until this present accounting.[2]

As already stated, in 1972 this Court announced the rule that testamentary grants to "children" should be read to include adopted children unless the testator's intention to exclude adopted children clearly appears. *Tafel Estate,* supra; see *Estate of Sykes,* 477 Pa. 254, 383 A.2d 920 (1978) (same rule for grants to "issue"). Occasioned by our decision in *Tafel,* the trustees of Henry Biddle's estate presented this accounting to the Orphans' Court Division of Chester County to determine whether appellant is entitled to share with his stepbrothers in the income of the trust. Appellant appeared and claimed a right to participate in future income distri-

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2. Because of the death of a trustee, another accounting was filed in 1958. Appellant did not receive notice of this accounting and all parties agree that the accounting is not relevant to any present issue.

butions. Appellant's step-brothers opposed his claim, urging that appellant was barred by the 1952 accounting.[3]

[1] The orphans' court refused to entertain the merits of appellant's claim. The orphans' court acknowledged that appellant had never previously presented any claim to participate in this trust and that the court had never previously determined his right to participate. Nevertheless, the orphans' court, relying principally upon *Tower Estate*, 463 Pa. 93, 343 A.2d 671 (1975), believed that the 1952 accounting, of which appellant had notice but to which appellant did not object, barred his present claim. The orphans' court's reliance upon *Tower Estate*, however, was erroneous. In *Tower Estate*, a similar question of post-*Tafel* income was presented to this Court. There, the natural children asserted that a
[Pa. 785] prior determination of this Court involving the same trust and excluding the adopted claimants made the adopteds' subsequent claim res judicata. Although the adopted children's right to future distributions was denied in that case on other grounds, a majority of this Court refused to hold the new claim barred by res judicata. As this Court pointed out in a decision after *Tower*, only two members of the six-member Court in *Tower* expressed the view that the doctrine of res judicata prohibited future payments to the claimants. *Estate of Flinn*, 479 Pa. 312, 323 n.3, 388 A.2d 672, 678 n.3 (1978).

The continuing refusal of a majority of this Court to adopt the res judicata rule is illustrated by *Fownes Estate*, 465 Pa. 182, 348 A.2d 416 (1975), where this Court, equally divided, affirmed an orphans' court award of post-*Tafel* trust income to an adopted child, despite a

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3. Because appellant and his step-brothers are both represented by counsel and because appellant seeks only prospective inclusion, the trustees have, properly, not taken any position on appellant's claim. See *Trusts of Holdeen*, — Pa. —, — n.5, 403 A.2d 978, 980 n.5 (1979).

pre-*Tafel* decision by this Court involving the same trust and expressly excluding the adopted child. In no case since *Tafel* has a majority of this Court been willing to find that a pre-*Tafel* denial of benefits to an adopted child precludes that child from future participation in a trust.

Similarly, res judicata does not bar the claim of the present appellant. Appellant makes no claim to any trust income already distributed, rather he seeks only to participate in future distributions of income generated by the trust. Most importantly, he seeks to do so on the basis of a rule of law recently announced by this Court. In such circumstances, the appropriate and fair resolution is for the orphans' court to allow participation in income earned and distributed in the future.

[2,3] It is well established that "[a] rule of law made in the distribution of a portion of an estate is not binding upon a court in a subsequent adjudication relating to another portion." *Estate of Flinn,* 479 Pa. 312, 323, 388 A.2d 672, 677 (1978) quoting *Arrott Estate,* 421 Pa. 275, 280, 217 A.2d 741, 744 (1966); accord, *Brown Estate,* 408 Pa. 214, 183 A.2d 307 (1962); *Kellerman's Estate,* 242 Pa. 3, 88 A. 865 (1913). A corollary of this principle, as this Court has held is that "it [is] the duty of the auditing judge to require that the present allocation be controlled by the law in effect at the time of the audit." *Arrott Estate,* supra 421 Pa. at 281, 217 A.2d at 745.

[4] The application of these principles is appropriate here where the prior audit was based on a legal doctrine no longer followed. *Estate of Flinn,* supra 479 Pa. at 323, 388 A.2d at 677; *Arrott Estate,* supra; *Reamer's Estate,* 331 Pa. 117, 200 A. 35 (1938). Our decision in *Tafel* established, without doubt, an important new rule of construction. More importantly, that decision was intended to insure for adopted children rights which for many years had unnecessarily been denied them. In

such a circumstance fairness requires that our courts apply the new rule prospectively.

Our determination here is no more than an application of the result reached by this Court just one year ago in *Estate of DeRoy*, 481 Pa. 403, 392 A.2d 1355 (1978) (opinion announcing the judgment of the Court with one Justice specially concurring). In *DeRoy* income from a testamentary trust was to be paid to the testator's son for the son's life. On the son's death the trust principal was to be distributed to the son's children or their issue. In default of children or issue the son's wife was to take a life estate. On the wife's death the trust corpus was to revert to the testator's estate. In 1933 the son died without natural children, but left an adopted child. The orphans' court appointed a guardian ad litem for the child and held a hearing at which the principal question was the adopted child's right to the trust. Based on the then current law the court refused to distribute the trust to the adopted child and instead awarded the son's wife a life estate. Forty-five years later, on the occasion of the wife's death, the adopted child again sought to take the property. The orphans' court, like the orphans' court in the present case, refused to allow the adopted child to participate on the ground that the prior adjudication barred the child's claim. This Court reversed. The opinion announcing the judgment of this Court in *DeRoy* re-
[786 Pa.] lied upon the principle we have already recited that a ruling of law by the orphans' court in the distribution of a portion of an estate is not binding upon a subsequent adjudication relating to another portion of the estate. 481 Pa. at 409-410, 392 A.2d at 1358.

More importantly, *DeRoy* emphasized the unfairness of precluding the adopted child from the benefits of our decision in *Tafel*. *DeRoy* quoted with approval the Restatement of Judgments, §70, Comment f (1948 Supp.) which provides that the determination of a question of law is not conclusive between the parties in a subsequent adjudication "if it would be unjust to one of the

parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other persons." As *DeRoy* explained.

> "It would obviously be unjust to apply [the rule of *Tafel Estate*] to adopted children other than appellant while adhering to the former rule when called upon to decide how the principal of the instant trust should be distributed."

481 Pa. at 410-11, 392, A.2d at 1358. We note that the tentative draft of the Restatement (Second) of Judgments retains this salutary principle in clear form. Section 68.1 (Tentative Draft No. 1) (1973) provides:

> "§68.1 Exceptions to the General Rule of Issue Preclusion
>
> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances.
>
> * * *
>
> (b) The issue is one of law and . . .
>
> (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws . . ."

The orphans' court should have been guided by this principle. Our decision in *Tafel* redressed a denial of rights which had persisted unnecessarily and unfairly for many years. Appellant's claim to future distributions of the trust income must be determined in the light of this important intervening change in the law.

[5] We therefore reach the merits of appellant's claim. The natural children urge that the presumption that adopted children be included is inapplicable in this

case because the language of Henry Biddle's will demonstrates his intention to exclude adopted children. This argument is completely meritless. Of course, if the language of testator's will disclosed testator's intention with reasonable certainty that intention would be controlling. *Estate of Sykes,* 477 Pa. 254, 383 A.2d 920 (1978); *Estate of Flinn,* supra 479 Pa. at 318-321, 388 A.2d at 675-6 (1978). The relevant portions of the will, however, simply use the words "children" and "issue." There is nothing in these words to indicate any clear intention one way or the other with regard to adopted children. See *Tafel,* 449 Pa. at 451, 296 A.2d at 802. Nor does the will, when read in its entirety, give any indication that the testator intended to exclude adopted children. The presumption in favor of adopted children therefore applies.

[6,7] The natural children also urge that our decision in *Tafel* is not applicable to the 1923 Biddle will because *Tafel* was based on a construction of the Adoption Act of 1925, Act of April 4, 1925, P.L. 127, §4, 1 P.S. §4 (1963). We have previously rejected this argument in *Estate of Flinn,* supra 479 Pa. at 320-321, 388 A.2d at 676 where we explained that *Tafel* and our subsequent cases were based on the Wills Act of 1917, Act of June 7, 1917, P.L. 403, §16(b), 20 P.S. §228 (1950). Thus this argument is equally without merit.[4].

---

4. We note that there has been litigation concerning separate property originating from the estate of testator's brother, W. Lyman Biddle. Testator's brother died in 1920, a resident of Montgomery County. His will left one-third of his residuary estate in trust, directing that the income be paid to his sister during her lifetime. On her death, one-half of the remainder of the trust was to go to testator, if living, and if not, to testator's issue as he might appoint, and in default of appointment to testator's issue outright. The sister died in 1937, and in *Biddle's Estate,* 333 Pa. 316, 5 A.2d 158 (1939), this Court held that item SIXTH of testator's will validly exercised the power of appointment granted him by his brother Lyman. This separate fund continues to be administered by the Montgomery County Court of Common Pleas, Orphans' Court Division.

The decree of the Court of Common Pleas of Chester County, Orphans' Court Division, is reversed and this case is remanded for proceedings consistent with this opinion. [Pa. 787]

Each party pay own costs.

MANDERINO, J., did not participate in the decision of this case.

LARSEN and FLAHERTY, JJ., concur in the result.

EAGEN, C. J., and O'BRIEN, J., dissent.

The record indicates that in 1950 appellant sought to participate as an income beneficiary of this Montgomery County trust. The Orphans' Court of Montgomery County denied appellant's claim. Appellant took timely exceptions to that decree, but his exceptions were dismissed and the orphans' court decree was made final on February 27, 1951. Appellant did not file any appeal.

The record further indicates that appellant has recently sought, based on *Tafel*, to participate in future income distributions of the Montgomery County property. The orphans' court there refused to allow appellant to participate on the ground of res judicata. Appellant took timely exceptions to the Montgomery County decree nisi, which were dismissed, and then appealed the Montgomery County decree to this Court. That appeal, however, has been discontinued.

Appellant's entitlement to any portion of the Montgomery County property is not before us and we express no view on that claim.

We agree with the Orphans' Court Division of Chester County, however, that the Montgomery County litigation, as it involves a distinct and separate fund from a separate estate should not preclude the present auditing court from now applying the correct rule of law to future distributions of the Chester County property. Rights to a distinct piece of property are not determined by a judgment concerning another piece of unrelated property. *Estate of Flinn*, 479 Pa. 312, 323, 388 A.2d 672, 677-78 (1978); see Restatement of Judgments §89, Comment e (1942) (effect of judgment limited to property litigated).

[206]

Biddle Trust

27 FID. REP. 206

Adoption — Adoptees as issue — Res judicata

Adopted child of deceased grandchild of 1923 decedent is not "issue" of grandchild under *Tafel* rule because barred by res judicata of earlier adjudication of which claimant was aware but did not present a claim. (Hunter 2d — Adoption 25(c), 26(c); Res Judicata 4.)

In the Orphans' Court Division of the Court of Common Pleas of Chester County. Trust under will of Henry W. Biddle, deceased. Trustee's fourth account. No. 15964 of 1924.

ADJUDICATION BY SATTERTHWAITE, J., SPECIALLY PRESIDING, JANUARY 12, 1977:

The fourth account of The Fidelity Bank, formerly Fidelity-Philadelphia Trust Company, surviving trustee of the trust estate under item 6th of the will of said decedent, was presented to the court for audit, confirmation and distribution of ascertained balances on September 16, 1976, as advertised according to law. The audit was duly continued at that time, but a later hearing for argument was held on December 2, 1976. Due proof of appropriate notice thereof to all parties legally interested in said estate appears in the record.

The accounting was occasioned by the desire of accountant and other parties in interest to raise and have
[207] the court decide a question of law as to the identity of the proper income beneficiaries under the decision of the Supreme Court in *Tafel Est.*, 449 Pa. 442 relating to, and significantly changing prior decisional law as to, the rights of adopted children as testamentary beneficiaries. The trust continues. * * *

No question has been raised as to the accounting itself. The only issue is whether or not James Murdock Da Costa, an adopted child of a deceased grandchild of testator, should henceforth be included as an income

beneficiary, sharing equally with the two natural born children of such deceased grandchild (and thus cutting down the latters' respective shares of income which they have been receiving, from one-sixth each to one-ninth each). The matter is presented by objections filed by all three such alleged income beneficiaries, respectively, to the petition for adjudication and its failure unequivocally to suggest the award of either one-sixth of the income to the two natural born beneficiaries, on the one hand, or one-ninth thereof to each of the three including the adoptee, on the other. The relevant facts are contained in the uncontroverted averments of the petition for adjudication, supplemented by certain additional documentation made part of the record at the hearing on December 2, 1976.

Decedent died July 2, 1923, leaving a will and codicils whereby he gave his residuary estate upon the within trusts with income, after the death of his surviving daughter Mildred L. Cadwallader (which occurred in 1949), to be paid

> ". . . among all of my grandchildren, share and share alike, such grandchildren to take per capita and not per stirpes. If, however, during the continuance of the said trust any of such grandchildren shall die, leaving children or issue of deceased children him or her surviving, such children and issue of deceased children to take among them, per stirpes, the share of income which their parent would have taken if living. . . ." [208]

The will further provided for the termination of the trust upon the death of the survivor of his daughter and those of his grandchildren living at his death, with principal to be distributed to children and issue of deceased children of both of his daughters (one had predeceased him) as may then be living.

At the death of decedent's daughter Mildred L. Cadwallader in 1949, there were three grandchildren (a fourth having died in 1940, apparently without issue), to

wit: Christine Biddle Scull, who subsequently died in 1968, leaving three children who still survive and whose interests are not in dispute; Isabella Da Costa Sage, who still survives; and C. Alexander Da Costa, who died on February 9, 1950, leaving two natural born sons Charles A. Da Costa, Jr. and Peter M. Da Costa, and the subject adopted son James Murdock Da Costa (hereinafter "contestant") who was born on December 19, 1928 and had been duly adopted when he was thirteen years of age on April 25, 1942 by the said C. Alexander Da Costa.

Subsequent to the death of Mildred L. Cadwallader, and the death of C. Alexander Da Costa having also intervened, the second account of the trustees was filed in the office of the clerk of this court on October 22, 1951, suggesting in the statement of proposed distribu-
[209] tion filed therewith the award of one-sixth shares of income to, inter alia, each of the guardians of the respective estates of Charles A. Da Costa, Jr. and Peter M. DaCosta, both then minors, with no award proposed for James Murdock Da Costa whatsoever. On January 21, 1952, the account was confirmed absolutely and the balances awarded in accordance with the statement of proposed distribution by the *pro forma* decree of this court, in accordance with the then practice in Chester County which had no separate orphans' court at that time.

As background to this 1951 accounting and the 1952 award in this court other prior proceedings and collateral documentation must be considered. In 1950, an accounting had been filed for audit in the Orphans' Court of Montgomery County in the trust estate arising under the will of W. Lyman Biddle, a brother of the within decedent who had died in 1920 and whose will had conferred a power of appointment upon the within decedent as to the remainder of part of a trust estate upon the death of a named life income beneficiary. The Supreme Court had held in *Biddle's Est.*, 333 Pa. 316 that the identical residuary clause of the within decedent's will constituted an exercise of the power under

the W. Lyman Biddle will. At this 1950 Montgomery County audit, likewise occasioned by the death of Mildred L. Cadwallader, contestant appeared and actively prosecuted his claim for entitlement to a share of income under the within decedent's will in exercise of the power as one of the class of "children or issue" of a deceased grandchild. The auditing judge by adjudication filed August 29, 1950 ruled against him on the basis that an adopted child, under then controlling precedents, was not within the common law contemplation of "children or issue" and, that no statute relevantly provided otherwise. Contestant's exceptions to the adjudication were overruled, and the adjudication was confirmed absolutely by the Montgomery County court en banc on February 27, 1951. No appeal was taken. [210]

Correspondence in 1951 among counsel, received in evidence at the within audit hearing, demonstrates that contestant was for a period undecided whether or not to acquiesce in the Montgomery County decision as a compelling precedent in the second accounting in the instant estate filed in Chester County in 1951. By letter of October 4, 1951 (Exhibit RC-12), however, contestant's counsel finally advised counsel for the trustee that he would not present any claim to share in the within decedent's trust estate. In fact, despite due notice of the 1951 Chester County audit to both contestant and his counsel (Exhibit RC-14), and with full awareness that he would not be included as an income beneficiary, contestant did not appear or present any claim therein, and the subject portion of the income of the within trust has in fact been paid exclusively to Charles A. Da Costa, Jr. and Peter M. Da Costa, the natural children of this deceased father, under the decree of January 21, 1952 of this court. (A third accounting was filed herein in 1958, occasioned by the death of an individual co-trustee, but the same would seem to be without present significance since no notice of the audit thereof was given to contestant so far as the record discloses and, of course, the instant question was not presented.) [211]

Contestant argues that by reason of the precedent-changing decision in 1972 in *Tafel Est.*, 449 Pa. 442, there is now a presumption that adopted children (if minors when adopted, as he was) are included in the concept of "children" in the absence of any expressed intention to the contrary in the trust document (and here there is none, according to him), so that he is prospectively entitled to a share of the income as a child of a deceased grandchild of the decedent; he argues that the doctrine of res judicata is inapplicable (1) because the question was not previously raised in this estate in this court, and (2) because of the principle of "separate funds" as an exception to the res judicata rule. These contentions, of course, are challenged by the natural children.

The auditing judge deems it unnecessary to consider many of the arguments *contra* to contestant's position, and holds that the doctrine of res judicata as enunciated and applied in *Tower Est.*, 463 Pa. 93, 343 A. 2d 671, and *Bell Est.*, 463 Pa. 109, 343 A. 2d 679 precludes any participation by contestant in view of the final and unappealed decision of this court on January 21, 1952 on the trustee's second accounting.

This result is reached, not because of the 1950-1951 adjudication and final decree of the Montgomery County court, since that litigation involved a different fund in a
[212] different estate (albeit that the within exact testamentary instrument and provisions were construed), nor even because that decision in any sense laid down "the law of the case" (which doctrine, of course, applies only to appellate precedents: *Filanowski v. Zoning Board of Adjustment*, 439 Pa. 360), but rather because the 1952 decree of this court in itself constituted a final judgment which was and is binding and conclusive upon all concerned, including the present contestant. While he in fact did not appear and litigate the question for express decision by the court at that time, the opportunity and occasion for him to do so were given and, he having been

sui juris and fully knowledgeable of the problem and the consequences of inaction, the legal result should be the same as though the matter had been presented and decided adversely to him. A default judgment, unopened and not appealed from, constitutes res judicata and is just as conclusive as one rendered after adversary and active litigation: *Zimmer v. Zimmer,* 457 Pa. 488. Such judgment need not have been by an appellate court to have this effect: *Haines Industries, Inc. v. City of Allentown,* 237 Pa. Super. 188, 355 A. 2d 588.

The decision of the Orphans' Court Division of Philadelphia in *Clark Trust,* 26 FIDUC. REP. 589, in an opinion by Judge Shoyer, dismissing exceptions to an adjudication by Judge Klein, involved a situation on all fours with the instant case insofar as the historical background and posture of the case were concerned for purposes of the res judicata argument. There, on an earlier accounting in 1970, Judge Lefever had ruled that [213] adopted children were not included as "issue"; due notice of that audit and of that question invovled had been given to the subject adoptees who, as in the instant case, were sui juris but did not appear at the audit or present their claim for participation as "issue," nor did they except to the adjudication or appeal therefrom. They did, however, claim for participation in the income at the later further accounting by the trustee on the death of another life tenant, but it was held, citing *Tower Estate,* supra, that they were barred on the ground, inter alia, of res judicata. Judge Shoyer observed, at p. 594 in language equally applicable to the instant case:

> "There can be no doubt that the adjudication of Judge Lefever in 1970, not excepted to and not appealed from, became a final judgment. It is also clear that these present exceptants, having failed to litigate the issue before Judge Lefever, which issue was properly raised in the notice given to them by the attorney for the accountant, and subsequently, was carefully considered and decided by the judge

against them, was and is a final judgment. In *Mershon Est.*, 364 Pa. 549, 550, 551, our Supreme Court affirmed per curiam the opinion of this court holding that heirs who had received notice of a sizable loss in a formal accounting, but had failed to appear and contest the same, were bound thereby and were not entitled to a review four years later which would re-litigate the same issue presented in the earlier accounting."

It is of no consequence that the notice of the 1951 accounting in this court (Exhibit RC-14) did not expressly point up the adopted child issue or that the decree of January 21, 1952 confirming the account and awarding the shares of income did not specifically discuss the question. It is apparent from the correspondence in evidence, as well as his participation in the
[214] Montgomery County active litigation, that the present contestant must have been fully aware of the problem and the further opportunity to present it anew to the court, of which opportunity he knowingly and informedly declined to avail. The lack of judicial discussion of the problem arose because the question simply never came before the court as a controverted matter requiring specific judicial action under the then practice in Chester County; since there was no separate orphans' court at that time, there was no automatic audit by the judges thereof and confirmation of the account and proposed distribution was pro forma approval of all issues, actual or potential, in accordance with the accountant's proposals, unless objections or exceptions were filed to bring the matter before the court for particular disposition.

Contestant's further argument that the "separate funds" exception to the res judicata rule is applicable is likewise disposed of by *Tower Estate*, supra. The opinion of the court therein, while recognizing the exceptions, specifically held that such principle could not allow relitigation of questions affecting vested property rights

and that the natural children's rights to trust income such as there (and here) presented were in the category of such vested property and accordingly were protected from subsequent judicial interference. See 463 Pa. at 103-104.

For the foregoing reasons, contestant's objections to the statement of proposed distribution in the within petition for adjudication are hereby overruled, and it is hereby directed that he is not entitled to share as an income beneficiary of the within trust. Accordingly, the one-third share of income attributable to the children of C. Alexander Da Costa is hereby awarded to Charles A. Da Costa, Jr. and Peter M. Da Costa equally, to the exclusion of James Murdock Da Costa, other shares as suggested by the last paragraph of the petition for adjudication, and principal is awarded back to accountant as trustee for further administration and distribution in accordance with decedent's will and his Adjudication. * * * [215]

EDITORS' NOTE: This case is annotated in *Fiduciary Review*, March 1977.

I, HENRY W. BIDDLE, of Paoli, Chester County, Pennsylvania, do make, publish and declare this to be my Last Will and Testament, hereby revoking and annulling any and all other Wills that I may heretofore have made.

FIRST. I direct my Executors hereinafter named to pay all my just debts and funeral expenses as soon as conveniently may be after my decease.

SECOND. I give and bequeath absolutely to my daughter Mildred L. Cadwalader all my personal belongings, wines, liquors and cigars, paintings, engravings, books, bric-a-brac, china, silver and plated ware, furniture, horses, carriages, motors and any and all household furniture and utensils, together with any farm or stable appliances that I may be possessed of at the time of my death, with the understanding that my daughter will make an equal division of this personal property between herself and the children of my daughter, Juliet, being guided in making this division by her own judgment and by any directions I may have communicated to her in my life, either verbally or by letter.

THIRD. I give and bequeath to Michael Curtin and Michael Harrigan the sum of Seven hundred and fifty Dollars ($750) each, provided they are in my employ at the time of my death.

FOURTH. I give my Executors the right and privilege of dividing the sum of Seven hundred and fifty Dollars ($750) among such persons as may be in my employ at the time of death; this however to be a matter entirely in the discretion of my Executors.

FIFTH. Under the partnership articles of Thomas A. Biddle & Company I have contributed to the capital of the firm Two hundred thousand Dollars ($200,000) until the termination of the partnership upon December 31st, 1921; if I should die before that time, I authorize my Executors to allow an additional sum of Two hundred thousand Dollars ($200,000) to remain as a loan to said firm without collateral until December 31st, 1921,

at the rate of six per cent (6%) per annum, when the said partnership shall be terminated, the the loan paid.

SIXTH. All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and nature and wheresoever situate, I give, devise and bequeath unto Fidelity Trust Company of the City of Philadelphia, and James D. Winsor, Jr., of Rosemont, Montgomery County, Pennsylvania, In Trust, to invest and reinvest the same, and to pay the net income therefrom as follows:

One half thereof unto my daughter, Mildred L. Cadwalader, for and during the full term of her natural life.

One half thereof, during the lifetime of my said daughter, Mildred L. Cadwalader, unto such of the children and issue of deceased children of my late daughter, Juliet DaCosta, as may be living at each quarterly period of distribution, in equal shares, per stirpes. If, however, at any quarterly period of distribution, during the lifetime of my said daughter, Mildred L. Cadwalader, there shall be living none of the children of my said daughter, Juliet DaCosta, nor issue of deceased children then to pay the entire income of my said residuary estate unto my said daughter, Mildred L. Cadwalader, for and during the full term of her natural life.

Upon the death of my said daughter, Mildred L. Cadwalader, to pay and divide the entire income from my said residuary estate during the continuance of this trust among all of my grandchildren, share and share alike, such grandchildren to take per capita and not per stirpes. If, however, during the continuance of the said trust any of such grandchildren shall die, leaving children or issue of deceased children him or her surviving, such children and issue of deceased children to take among them, per stirpes, the share of income which their parent would have taken if living. If, however, any of such grandchildren shall die during the continuance of the said trust without leaving children or issue of de-

ceased children him or her surviving, then the share of the said grandchild so dying shall be held upon the same terms of trust and with the same remainders over as is herein provided for the share of my other grandchildren.

The said trust shall continue until the death of the survivor of my said daughter, Mildred L. Cadwalader and such of my grandchildren as may be living at the time of my death. And upon the termination of the said trust I direct my said Trustees, or the survivor of them, to transfer, assign and pay over the principal of my said residuary estate unto such of the children and issue of deceased children of my said daughter, Mildred L. Cadwalader and issue of deceased children of my said daughter, Juliet DaCosta, as may be living at that time, equally, absolutely, per stirpes. In default, however, of children or issue of deceased children of my said daughters living at that time, then to transfer, assign and pay over the principal of my said residuary estate unto such person or persons as would be entitled thereto under the intestate laws of the State of Pennsylvania, if I had died at the time fixed for the said distribution, intestate, possessed thereof in fee and absolutely.

SEVENTH. I direct that the corpus or principal of my estate, and the income therefrom, so long as the same are held by my Executors or Trustees or the survivor of them, shall be free from the control, debts, liabilities and engagements of legatees or of anyone beneficially interested therein, and shall not be subject to assignment by them nor to execution nor process for the enforcement of judgments or claims of any sort against them. I further direct that all payments of income under any of the provisions of my will, shall be made only as the same accrues and not by way of anticipation.

EIGHTH. I direct that all taxes upon any of my bequests shall be paid by my residuary estate.

NINTH. I appoint the Fidelity Trust Company of the City of Philadelphia and James D. Winsor, Junior, of Rosemont, Montgomery County, Pennsylvania, Executors of this my Last Will and Testament.

TENTH. For the payment of my debts or the administration of my estate, or for the distribution thereof or for any other purpose, I hereby authorize and empower my Executors and Trustees, herein named, and the survivor of them, to sell any and all the property, real and personal, belonging to my said estate, either at public or private sale, at such time or times, for such price, upon such terms as to cash and credit as they or it may think best, and to execute and deliver to the purchaser or purchasers contracts, deeds, bills of sale and all other instruments of writing necessary or proper to carry this provision into effect, without any liability on the part of the purchaser or purchasers to see to the application of the purchase money; and I also authorize and empower my said Executors and Trustees, and the survivor of them, either to hold any of the investments of which I may die possessed, or in their or its absolute discretion to sell the same and reinvest the proceeds thereof, or any other funds coming into their or its hands as such Executors and Trustees in such property, real and personal as to them or it shall seem best, without being limited to such as are usually termed "legal securities".

I hereby relieve my said Executors and Trustees, and the survivor of them, from any and all liability by reason of the above powers hereby vested in them, except for gross and wilful negligence in the exercise thereof.

ELEVENTH. I hereby authorize and empower my Executors and Trustees herein named, and the survivor of them, at any time, and from time to time, in their or its discretion, if they or it deem it for the best interests of my estate, to borrow money, and to negotiate loans, either with or without the pledge of collateral, and to make all assignments and transfers necessary and proper therefor; without any liability on the part of the lender to see to the application of the proceeds of any such loan or loans and without any corporate or personal liability on my said Executors and Trustees therefor, such loans not

to exceed in the aggregate at any time the sum of One hundred thousand Dollars ($100,000.)

IN WITNESS WHEREOF, I have hereunto set my hand and seal this sixteenth day of December A.D. Nineteen hundred and twenty.

Signed, Sealed, Published and Declared by the testatator Henry W. Biddle as and for his Last Will and Testament in the presence of us, who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses:

HENRY W. BIDDLE

S. W. COUSLEY, 325 Chestnut St., Phila.
W. G. LITTLETON, 325 Chestnut St., Phila.

APPENDIX

Biddle Estate

Trusts — Adoptive children — Res judicata.

1. An adjudication of the Orphans' Court of Montgomery County, dated August 29, 1950, denying adopted son's claim to a share of income is binding despite the recent trend broadening the rights of adoptive children beginning with *Tafel Estate*, 449 Pa. 442.

2. *Tower Estate*, 343 A.2d 67, cited and followed.

(Appealed to Supreme Court February 8, 1977.)

C. P. Montgomery County, Orphans' Court Division. No. 33,018. Estate of W. Lyman Biddle, deceased.

Third account of The Fidelity Bank, surviving trustee under the will of Henry W. Biddle, deceased, in exercise of power of appointment under will of W. Lyman Biddle, deceased.

TAXIS, J., November 30, 1976: — The reason for the filing of the present account is that 18 years of administration are sought to be confirmed and also to afford the accountant an opportunity to present a question concerning a claim made by James Murdock DaCosta who was adopted at age 13, on April 25, 1942, in Fairfax County, Virginia, by C. Alexander DaCosta. The trust continues.

The account shows a balance of principal and income of $363,999.25. The principal was revalued on June 11, 1976, in the sum of $564,076.37, composed of the securities set forth on pages 2 and 3 of the account, and cash.

The transfer inheritance tax assessed has been paid.

All parties having or claiming any interest in the trust, of whom the accountant has notice or knowledge, are stated to have received written notice of the audit in conformity with the rules of court.

[185] A claim has been presented by James Turner Murdock DaCosta seeking a share of the income as a result of his adoptive father's death.

W. Lyman Biddle died on July 5, 1920, and item ninth (b) of his will provided as follows: ". . . and upon the death of my sister, Anna S. Blair, then to divide the said one-third part of my residuary estate into moieties, and to convey, assign, transfer and pay over one of the said moieties to my brother Henry W. Biddle if he be then living; to have and to hold the same to him, his heirs and assigns forever. And if my brother Henry W. Biddle be not then living then in trust to convey assign transfer and pay over the said moiety of the one-third equal share or purport of my said residuary estate to such of his *issue* then surviving in such proportions and for such interest and upon such limitations or trusts as he shall by his last Will and Testament appoint, or in default of appointment then to the said surviving *issue* of my said brother Henry W. Biddle in such proportions as they would have been entitled to the said moiety of the said one-third share or purport of my said residuary estate if my said brother had died seized of the same intestate and unmarried; his said *issue*, however, taking as purchasers and not by way of limitation or descent." (Italics added.)

Anna S. Blair died July 14, 1937, Henry W. Biddle having predeceased her on July 2, 1923.

In item sixth of his will, the said Henry W. Biddle exercised the said power of appointment by giving his residuary estate to his trustees: (1) during the lifetime of his daughter, Mildred L. Cadwalader, to pay one-half of the income to her and the other one-half to the issue of his deceased daughter, Juliet DaCosta, per stirpes; (2)

on the death of his said daughter, to pay the income to his grandchildren, per capita, and the issue of deceased grandchildren, per stirpes; and (3) on the death of the survivor of his said daughter and his grandchildren living at his death, to distribute the principal to such of the children and issue of his two daughters "as may be living at that time, equally, absolutely, per stirpes."

Mildred L. Cadwalader died September 19, 1949, and her daughter, Christine Biddle Scull, died March 20, 1968.

C. Alexander DaCosta and Jessie F. DaCosta Gamble, children of Henry W. Biddle's deceased daughter, Juliet DaCosta, died February 9, 1950, and November 3, 1940, respectively.

James D. Winsor, Jr., cotrustee, died January 11, 1957.

After the death of Anna S. Blair on July 14, 1937, the question arose whether Henry W. Biddle effectively exercised a power of appointment granted to him by the will of W. Lyman Biddle. The Supreme Court concluded that the same had been properly exercised. See *Biddle's Estate*, 333 Pa. 316.

In item sixth of his will, Henry W. Biddle established a trust from the appointive property, directing his trustees to pay one-half of the income to his daughter, Mildred L. Cadwalader, for her life and the other one-half to the issue of his deceased daughter, Juliet DaCosta, per stirpes. At the death of Mildred L. Cadwalader, which occurred on September 19, 1949, the trustees were directed to pay all of the income to the testator's grandchildren, per capita, of whom there were then three and, per stirpes, to the issue of deceased grandchildren, of whom there was then none. The portion of the will containing this direction is as follows: [186]

"Upon the death of my said daughter, Mildred L. Cadwalader, to pay and divide the entire income from my said residuary estate during the continuance of this

trust among all of my grandchildren, share and share alike, such grandchildren to take per capita and not per stirpes. If, however, during the continuance of the said trust any of such grandchildren shall die, leaving children or issue of deceased children him or her surviving, such children and issue of deceased children to take among them, per stirpes, the share of income which their parent would have taken if living. If, however, any of such grandchildren shall die during the continuance of the said Trust without leaving children or issue of deceased children him or her surviving, then the share of the said grandchild so dying shall be held upon the same terms of trust and with the same remainders over as is herein provided for the share of my other grandchildren."

The first of the testator's three said grandchildren to die was C. Alexander DaCosta on February 9, 1950. He was survived by two natural children, Charles A. DaCosta, Jr., (born November 27, 1931) and Peter M. DaCosta (born September 11, 1937) and a third child, James Murdock DaCosta (born December 19, 1928), whom the said C. Alexander DaCosta had adopted at age thirteen on April 25, 1942.

At the time of the death of the said C. Alexander DaCosta, the accountants had prepared their first account, to be filed with this court by reason of the death on September 19, 1949, of testator's daughter, Mildred L. Cadwalader. At the ensuing audit, the said James Murdock DaCosta, who was then twenty-one years of age and represented by counsel, presented a claim that, as an adopted son of C. Alexander DaCosta, he was entitled to a one-third share of the income theretofore received by his father. A hearing was held on June 15, 1950, when this and other questions were presented for consideration. By adjudication dated August 29, 1950, Judge E. Arnold Forrest, specially presiding for this court, rejected the claim of James Murdock DaCosta. Exceptions were filed but, after consideration by the

court en banc, these were dismissed, and the adjudication confirmed absolutely by President Judge Holland on February 27, 1951. No appeal from that adjudication was taken by any party.

It is clear to the court that the adjudication of the court dated August 29, 1950, denying the adopted son's claim to a share of income is binding despite the recent trend broadening the rights of adoptive children beginning with *Tafel Estate,* 449 Pa. 442.

A somewhat similar situation arose in *Tower Estate,* [187]
343 A. 2d 671. In *Tower* the Court said, as follows:

"We hold that res judicata bars the adopted children from relitigating their claim. By no means do we intend to encroach upon the landmark decision in *Tafel.* Although the law of this Commonwealth is replete with progressive judicial pronouncements and legislative enactments which recognize the rights of adopted children, those statutes and cases cannot be construed as an infringement upon the time-honored doctrine of res judicata. Unless the doctrine of res judicata applies to preclude the claim of the adopted children, questions involving the propriety of a previously adjudicated scheme of ordinary income distribution are apt to be raised by aspiring relatives every time new income received by a trust is ripe for distribution. Despite the unfavorable termination of earlier litigation, such persons may bring suit again and again, thus causing complexity, annoyance and uncertainty to trustees and beneficiaries alike, upon the mere hope of changing the judicial interpretation of a trust instrument or challenging stare decisis": Pa., 343 A.2d at 677.

Therefore, the court concludes that its prior adjudication effectively bars the adoptive son in sharing in the income interest of C. Alexander DaCosta.

Subject to the views expressed in this adjudication and subject to distributions heretofore properly made, the net ascertained balances of principal and income are

awarded as set forth under the last paragraph of the petition for adjudication.

Power and authority are given the accountant to make the necessary assignments and transfers of the unconverted investment securities herein awarded in kind.

The account is confirmed, and it is hereby ordered and decreed that The Fidelity Bank, surviving trustee, as aforesaid, forthwith pay the distributions herein awarded.

And Now, November 30, 1976, this adjudication is confirmed nisi.

(Appealed to Supreme Court February 8, 1977.)

(Appeal discontinued.)

Supreme Court, U. S.
FILED
MAY 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1707

IN RE: ESTATE OF HENRY W. BIDDLE, DECEASED

CHARLES A. DaCOSTA, JR.
and
PETER M. DaCOSTA,

Petitioners

v.

JAMES MURDOCK DaCOSTA
and
THE FIDELITY BANK,

Respondents

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES R. LEDWITH
CHARLES J. BLOOM
2001 The Fidelity Building
Philadelphia, PA 19109
(215) 893-3000
Attorneys for Respondent, James Murdock DaCosta

Of Counsel:
EDWARD J. LENTZ
MARY ANN ROBINSON
PEPPER, HAMILTON & SCHEETZ

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
1. The Constitutional Issue Was Not Properly Raised Below	5
2. No Vested Property Rights Are Involved	6
3. The Decision Below Applies Prospectively Only	7
CONCLUSION	8

TABLE OF CITATIONS

Cases: Page

Abrams Will, 419 Pa. 92, 213 A. 2d 638 (1965) 5
Arrott Estate, 421 Pa. 275, 217 A. 2d 741 (1966) 7, 8
Biddle Trust, 102 Montg. 184, 27 Fiduc. Rep. 97 (O. C. Montg. 1976) 2
Catherwood Trust, 405 Pa. 61, 173 A. 2d 86 (1961) overruled on other grounds, Pew Trust, 411 Pa. 96, 191 A. 2d 399 (1963) 6
Estate of DeRoy, 481 Pa. 403, 392 A. 2d 1355 (1978) 7
Estate of Flinn, 479 Pa. 312, 388 A. 2d 672 (1978) 7
Ferguson v. Georgia, 365 U. S. 570 (1961) 5
In re Lamkin, 355 U. S. 59 (1957) 5
Kellerman's Estate, 242 Pa. 3, 88 A. 865 (1913) 7, 8
Live Oak Association v. Railroad Commission, 269 U. S. 354 (1926) 6
Lynch v. New York ex rel. Pierson, 293 U. S. 52 (1934) 6
Montgomery County Bar Association v. Rinalducci, 329 Pa. 296, 197 A. 924 (1938) 5
Street v. New York, 394 U. S. 576 (1969) 6
Tafel Estate, 449 Pa. 442, 296 A. 2d 797 (1972) 4, 6, 7

Statutes:

28 U. S. C. § 1257(3) (1970) 2, 5, 6

U. S. Constitution:

Fourteenth Amendment 4

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1707

IN RE: ESTATE OF HENRY W. BIDDLE, DECEASED

CHARLES A. DaCOSTA, JR.

and

PETER M. DaCOSTA,

Petitioners

v.

JAMES MURDOCK DaCOSTA

and

THE FIDELITY BANK,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, James Murdock DaCosta, opposes the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania submitted by Charles A. DaCosta, Jr. and Peter M. DaCosta, Petitioners. Petitioners have presented no compelling reasons for this Court to grant the Writ in

this routine will construction matter. The constitutional issue now presented was not properly raised in the courts below. Contrary to Petitioners' assertions, no vested rights have been infringed upon, and, in any event, the decision of the Supreme Court of Pennsylvania is prospective only in its application.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania is reported unofficially at 410 A. 2d 782 (Pa. 1980). It has not yet been officially reported.

The case of *Biddle Trust,* 102 Montg. 184, 27 Fiduc. Rep. 97 (O. C. Montg. 1976), cited by Petitioners as a related case, is irrelevant to this proceeding.

In all other respects, Respondent is satisfied with Petitioners' presentation of the opinions below.

JURISDICTION

Petitioners failed to raise and preserve the Due Process issue in the courts below.

The relevant statutory provision is 28 U. S. C. § 1257 (3), and not 27 U. S. C. § 1257(3).

In all other respects, Respondent is satisfied with Petitioners' presentation regarding the jurisdiction of the Court.

CONSTITUTIONAL PROVISION INVOLVED

Assuming a Due Process issue is presented, Respondent is satisfied with Petitioners' presentation of the relevant constitutional provision.

QUESTION PRESENTED

Should this Court expend its resources to review a routine will construction case, where no Due Process issue

was properly raised in the courts below, where no vested rights of Petitioners are involved or affected and where the decision of the Pennsylvania Supreme Court has prospective application only.

STATEMENT OF THE CASE

This case is an ordinary will construction matter under state law. It presents the issue whether an adopted child is entitled to share in future, undistributed trust income on an equal basis with natural children under a testamentary gift to "children."

The Testator, Henry W. Biddle, died on July 2, 1923, leaving a Will dated December 16, 1920 and Codicil dated June 23, 1923. In Paragraph SIXTH of the Will, the Testator created a trust providing that upon the death of a daughter, income should be paid to Testator's grandchildren, per capita, and the issue of deceased grandchildren, per stirpes. The trust further provides:

> "If, however, during the continuance of said trust, any of such grandchildren shall die, leaving *children* or *issue* of deceased children him or her surviving, such *children* and *issue* of deceased children to take among them, per stirpes, the share of income which their parent would have taken if living." (emphasis supplied).

On February 9, 1950, one of Testator's grandchildren, C. Alexander DaCosta, died. He was survived by two natural children, Charles A. DaCosta, Jr. and Peter M. DaCosta (Petitioners), and one adopted child, James Murdock DaCosta (Respondent).

In 1951, the Trustee filed its Account and requested an award of the income which was previously distributable to C. Alexander DaCosta in equal shares to the Guardians

of the Estates of Petitioners, both of whom were then minors. On January 21, 1952, the Account was confirmed absolutely, no question having been raised before the court as to whether Respondent was entitled to share in the trust income.

On November 17, 1972, the Supreme Court of Pennsylvania filed its decision in *Tafel Estate,* 449 Pa. 442, 296 A. 2d 797 (1972). The court held that in the absence of a contrary intent expressed in a will, the testator is presumed to have intended to treat adopted children in the same manner as natural children. Thus, a testamentary gift to "children" includes adoptees.

On the basis of *Tafel,* Trustee filed an account in 1976 to determine Respondent's rights, if any, to *future,* undistributed trust income. Trustee took the position, pursuant to *Tafel,* that Respondent was entitled to share in future trust income; that is, post-1976 trust income.

Petitioners filed Objections to the Trustee's Statement of Proposed Distribution. The Objections did not raise the Due Process issue which Petitioners are now requesting this Court to review. Respondent appeared at the Audit and asserted his claim to a share of future trust income. The Auditing Judge and the Orphans' Court en banc denied Respondent's claim on res judicata grounds. Petitioners never raised the Due Process issue in the Orphans' Court, either before the Auditing Judge or before the court en banc. Their brief in the Supreme Court of Pennsylvania includes an offhand reference to the Fourteenth Amendment.

The Supreme Court of Pennsylvania reversed the Orphans' Court decision, thus upholding Respondent's claim. The court did not consider Petitioners' Due Process argument now raised seriously for the first time in the Petition for Writ of Certiorari.

ARGUMENT

This case does not present a question worthy of this Court's consideration; on the contrary, this case presents a simple issue of will construction involving the definition of "children" and whether an adoptee may share in trust income as a "child". The constitutional issue of Due Process is not presented by this case. In fact, Petitioners have failed to cite any cases which hold that there is any Due Process issue involved. To the extent that the cases cited by Petitioners even discuss Due Process, the discussion is purely dictum.

The Court should not grant the Writ for three reasons: first, the constitutional issue of Due Process was not properly raised below; second, as a matter of state law, no vested property rights are affected or involved; and finally, this case affects only future, undistributed trust income, therefore presenting no question of retroactivity.

1. The Constitutional Issue Was Not Properly Raised Below.

Petitioners failed properly to raise or preserve below the constitutional issue which is now being presented to the Court. Therefore, the Court should not exercise its jurisdiction under 28 U. S. C. § 1257(3). *Ferguson v. Georgia*, 365 U. S. 570 (1961); *In re Lamkin*, 355 U. S. 59 (1957). Petitioners did not at any time raise the issue in the Orphans' Court, either before the Auditing Judge or before the court en banc. The Pennsylvania Supreme Court has ruled that questions cannot be presented for the first time on appeal. *See, e.g., Abrams Will*, 419 Pa. 92, 213 A. 2d 638 (1965); *Montgomery County Bar Association v. Rinalducci*, 329 Pa. 296, 197 A. 924 (1938). Therefore, the question is not properly before this Court.

The Petition states that the question was raised in Petitioners' appellate brief and at oral argument. This is clearly insufficient to establish that a federal question was properly raised. *Lynch v. New York ex rel. Pierson,* 293 U. S. 52 (1934); *Live Oak Association v. Railroad Commission,* 269 U. S. 354 (1926). Moreover, the Pennsylvania Supreme Court did not even address the constitutional issue. Therefore, this Court may properly assume that the issue was not properly raised in the state courts. *Street v. New York,* 394 U. S. 576 (1969).

For all of these reasons, the Court should not exercise its jurisdiction under 28 U. S. C. § 1257(3).

2. No Vested Property Rights Are Involved.

The decision of the court below does not deprive Petitioners of any vested rights. Testator's Will provides that the "children" of a deceased grandchild are entitled to share in trust income. The decision applies a new rule of law in construing the word "children" to include adoptees. This new rule of construction, as enuncited in *Tafel,* does not apply when a testator's intent is affirmatively expressed; it only applies where no such intention appears. No expressed intention of the Testator has been disturbed in this case. *Tafel* changed only the presumption to be applied in the absence of such intent. Thus, no vested rights have been violated.

The Supreme Court of Pennsylvania has confirmed this proposition. "[A] vested property right cannot exist in a rule of law." *Catherwood Trust,* 405 Pa. 61, 72, 173 A. 2d 86, 91 (1961) *overruled on other grounds, Pew Trust,* 411 Pa. 96, 191 A. 2d 399 (1963). Thus, under state law, Petitioners have no vested property right in a rule of construction defining the term "children" and can therefore raise no colorable Due Process claim.

Moreover, *Tafel* states that the prior Pennsylvania decisions, which applied the old rule of construction in excluding adoptees as "children", were erroneous. In fact, the court stated that it was undertaking "[a] fresh reading of the adoption statutes", forcing it to "disavow" its earlier position. 449 Pa. at 449, 296 A. 2d at 800. The correction of a previous misinterpretation of a statutory provision is entirely appropriate and fundamentally different from a retroactive application of a newly-created rule of law. Thus, if a vested property right cannot exist in a rule of construction, such right cannot possibly exist in a rule which is admittedly erroneous.

3. The Decision Below Applies Prospectively Only.

The decision below applies to future, undistributed income of the trust. No income which was distributed prior to the audit in 1976 is affected by the decision below. The court emphasized the prospective nature of Respondent's claim:

> ". . . [he] makes no claim to any trust income already distributed, rather he seeks only to participate in future distributions of income generated by the trust." 410 A. 2d at 785.

Thus, Petitioners' assertion of retroactivity is without merit.

Under Pennsylvania law, it has long been held that "[a] rule of law made in the distribution of a portion of an estate is not binding in a subsequent adjudication relating to another portion." *Estate of DeRoy,* 481 Pa. 403, 410, 392 A. 2d 1355, 1358 (1978). *See also Estate of Flinn,* 479 Pa. 312, 323, 388 A. 2d 672, 677 (1978) quoting *Arrott Estate,* 421 Pa. 275, 280, 217 A. 2d 741, 744 (1966); *Kellerman's Estate,* 242 Pa. 3, 11, 88 A. 865, 868

(1913). Moreover, "it was the duty of the auditing judge to require that the present allocation be controlled by the law in effect at the time of the audit." *Arrott Estate,* 421 Pa. 275, 281, 217 A. 2d 741, 744 (1966). Thus, each accounting in the administration of a Pennsylvania trust is treated as a separate and distinct fund, and no question of retroactive application arises.

CONCLUSION

For all of the above reasons, Respondent urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES R. LEDWITH
CHARLES J. BLOOM
2001 The Fidelity Building
Philadelphia, PA 19109
(215) 893-3000
Attorneys for Respondent, James Murdock DaCosta

Of Counsel:
EDWARD J. LENTZ
MARY ANN ROBINSON
PEPPER, HAMILTON & SCHEETZ